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IN THE

Supreme Court of the United States.

October Term, 1966.

No.

RUTH S. WELLS,

Petitioner,

v.

CIVIL SERVICE COMMISSION OF PHILADELPHIA, PA.

AND

FOSTER ROSER, PERSONNEL DIRECTOR OF CITY OF PHILADELPHIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

The Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Pennsylvania entered in the above case on January 6, 1967.

OPINIONS BELOW.

The opinion of the Common Pleas trial court of Philadelphia County is unreported. The opinion of the Supreme Court of Pennsylvania is not yet reported.

JURISDICTION.

The opinion of the Pennsylvania Supreme Court was filed on January 6, 1967 and is printed *infra*, pp. 16-21. The jurisdiction of this Court is invoked under 28 U. S. C. section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

Section 1 of the 14th Amendment of the United States Constitution:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *U. S. C. Constitution, Amend. 14.*

QUESTION PRESENTED.

On April 5, 1966, the Petitioner, a policewoman employed by the Philadelphia Police Department, filed a Complaint in Equity against the Respondents praying for a decree which would eliminate the oral test from the examination for the position of policewoman sergeant. She alleged that where the men applicants for police sergeant were required to take a wholly written examination, the requirement of a part oral examination for policewomen sergeants was an unlawful employment discrimination based on sex. The Respondents filed preliminary objections averring that the Complaint failed to state a cause of action in that no justiciable issue was raised. The Court of Common Pleas of Philadelphia County, Pennsylvania, sustained the preliminary objections, and dismissed the Complaint. The Petitioner appealed directly to the Supreme Court of Pennsylvania. The Supreme Court affirmed the lower court's action. The Question presented is:

1. Where the two positions, police sergeant and policewomen sergeants, have the same duties, responsibilities and qualifications is the action of the Respondents in sanctioning and requiring an oral examination for the applicants for the position of policewomen sergeant and not for the applicants for the position of policewomen sergeant a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, as an arbitrary and unlawful employment discrimination based on sex?

STATEMENT OF THE CASE.

Petitioner, a policewoman employed by the City of Philadelphia, seeking promotion to the position of policewoman sergeant, filed a Complaint in Equity against the Civil Service Commission and the Personnel Director of the City of Philadelphia, praying for a decree which would eliminate the oral test from the examination for the position of policewomen sergeant.

The promotional examination for the position of policewomen sergeant includes a written test rated at 50%, seniority considerations rated at 10% and an oral test rated at 40% of an applicant's total possible score. The examination for the position of police sergeant (male) has a 90% rated written test and a 10% seniority rating.

Petitioner's Complaint in Equity alleged that the positions of police sergeant (male) and policewomen sergeant have the same duties, responsibilities and qualifications, and therefore the testing procedures adopted by the Philadelphia Civil Service Commission by the direction of the Personnel Director constituted an unlawful employment discrimination based on sex. Accompanying the Complaint was a motion for a preliminary injunction seeking to restrain respondents from giving the oral test to women applicants. The respondents filed preliminary objections in the nature of a demurrer. A Hearing was held on a Rule to Show Cause why a preliminary injunction should not issue as prayed for. Following this hearing the Equity trial court filed an opinion dismissing Petitioner's Complaint in which it passed upon the constitutional question and, accordingly, made findings of fact and conclusions of law, which ruled upon the Petitioner's claimed right under the federal constitution in the following language:

> "In order to withstand the preliminary obecjtions, plaintiff must establish the validity of at least one of the two theories upon which the complaint was drafted:

That this testing procedure (1) violates the equal protection clause of the 14th Amendment or (2) constitutes an arbitrary and unreasonable abuse of discretion by the Commission.

EQUAL PROTECTION

It is settled that the equal protection clause operates fully to include women within its protective scope. But the Fourteenth Amendment does not interfere with a distinction based upon sex by creating a fictitious equality where there is a *real difference*. *Quong Wing v. Kirkendall*, 223 U. S. 59.

In this case, there is a real difference, both with respect to the nature of the two jobs, and the fact that competition for promotion exists separately among men and women.

* * *

There is no rule of law which requires that men and women receive equal treatment. Plaintiff has the burden of showing that the treatment she received was arbitrary, unfair, or prejudicial. This she has not done." (Appendix pp. 10, 11, 13)

Petitioner appealed this decision directly to the Supreme Court of Pennsylvania. Her appeal presented two questions for the consideration of that Court. The federal constitutional question was raised in the Petitioner's brief to the Pennsylvania Supreme Court in the following language:

"Statement of Questions Involved"

2. Was the action of the Personnel Director in requiring different testing procedures for male and female police sergeants a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution."

(The court below answered this question in negative.) (Appendix p. 15)

The Supreme Court of Pennsylvania affirmed the decision of the Common Pleas Court of Philadelphia. The court passed on the constitutional question raised by Petitioner in the following language of the majority opinion.

> "The plaintiff contends that the oral test for female applicants and not for male applicants is an arbitrary and unfair discrimination and thus violates the equal protection clause of the 14th Amendment of the Constitution of the United States. The plaintiff admits in her brief that 'there is, of course, no rule requiring equal treatment for men and women under all circumstances.' That is the answer to the problem raised in this case. As stated by *Justice Frankfurter in Goesart v. Cleary,* 335 U. S. 464. 'The Constitution does not require situations' which are different in fact or opinion to be treated in law as though they were the same." (Appendix p. 17)

Petitioner now seeks certiorari in order to have this important question of Constitutional law reviewed by the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Supreme Court of Pennsylvania affirming the use of an oral promotion examination for women applicants for the position of policewoman sergeant when the men applicants for the position of police sergeant were required to take an entirely written examination, is not in accord with the applicable decisions of this Court.

In *Truax v. Corrigan,* 257 U. S. 312 (1921), this Court established that the Fourteenth Amendment demands that all persons in like circumstances receive equality of treatment regardless of whether the State action confers a privilege or a right or imposes a duty or obligation. This decision also established the difference in meaning, direction and purpose between the Due Process clause and the Equal Protection clause, and that the existence of due process without equal application of the law would still render the "questioned" State action invalid. It is furthermore established that while State legislation or action may impose special burdens upon defined classes in order to achieve permissible ends, the Equal Protection Clause of the Fourteenth Amendment requires that in defining a class subject to the action the distinctions drawn must have some relevance to the purpose for which the classification is made. *Rinaldi v. Yeager,* 384 U. S. 304 (1966); *Baxstrom v. Herold,* 383 U. S. 107 (1965).

It is clear that the provision for the promotional examinations is a permissibile methd for a Community or State to achieve better qualified persons in Civil Service positions. However, to fasten an additional burden of an oral examination upon certain applicants because of their sex alone is to make an invidious discrimination. All that distinguishes men applicants not required to take the oral examination from the women applicants required to take the oral examination is their sex. There is no defensible interest served by focusing on this distinction as a classify-

ing feature in a civil service examination regulation because it bears no relationship whatever to the purpose of the civil service provision involved. The qualifications of a female applicant for the position of policewoman sergeant may be equally as validly tested as a male applicant's qualifications through the use of an entirely written test. Under the circumstances the use of a 40% rated oral examination, with its built-in opportunities for other types of invidious discrimination, is a violation of the Equal Protection clause of the 14th Amendment.

2. Furthermore, the Question raised in this Petition for a Writ of Certiorari is a very important Constitutional question involving the validity of employment discriminations based on sex. This area of the law is gaining increasing importance as more and more women demand equal opportunity in employment. The very passage of Title VII of the Civil Rights Act of 1964 with its provisions forbidding private employers from practicing sexual discrimination points up the question presented here.[1] Admittedly this employer, the City of Philadelphia, is not within the provisions of Title VII, however the spirit and purpose of that landmark legislation can be and should be applied to the governmental employer as well as the private employer.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

MARVIN R. HALBERT,
SEYMOUR KANTER,
Counsel for Petitioner.

1. Act of July 2, 1964, P. L. 88-352, Title VII, Section 701, 78 Stat. 253, 42 U. S. C. 2000.

APPENDIX TO PETITION.

COMMON PLEAS COURT No. 4 OF PHILADELPHIA COUNTY.

March Term, 1966. No. 2406.

RUTH S. WELLS,

v.

CIVIL SERVICE COMMISSION ET. AL.

ORDER.

AND Now, May 19, 1966, oral argument having been had, and Briefs submitted, the Court enters the following

ORDER.

Preliminary Objections of Defendants are sustained. Plaintiff's Rule for a Preliminary Injunction is discharged and her Complaint is dismissed.

By THE COURT:

(Sgd.) LEVIN, *P. J.*

COMMON PLEAS NO. 4.

MARCH TERM,

No. 2406.

RUTH WELLS

v.

CIVIL SERVICE COMMISSION, ET AL.

OPINION.

Plaintiff filed a complaint in equity, alleging that certain testing procedures adopted by the Civil Service Commission constituted an unlawful employment discrimination based on sex. Among those taking the test for advancement to the rank of police sergeant, men were given a written test, while women were required to take an oral examination, in addition to the written test. The accompanying motion for preliminary injunction sought to restrain defendant from giving the oral test to women applicants.

Defendant filed preliminary objections in the nature of a demurrer. In order to withstand the preliminary objections, plaintiff must establish the validity of at least one of the two theories upon which the complaint was drafted: that this testing procedure (1) violates the equal protection clause of the Fourteenth Amendment or (2) constitutes an arbitrary and unreasonable abuse of discretion by the Commission.

EQUAL PROTECTION

It is settled that the equal protection clause operates fully to include women within its protective scope. But the Fourtenth Amendment does not interfere with a dis-

tinction based upon sex by creating a fictitious equality where there is a *real difference. Quong Wing v. Kirkendall,* 223 U. S. 59.

In this case, there is a real difference, both with respect to the nature of the two jobs, and the fact that competition for promotion exists separately among men and women. At no time are the test scores of the women compared to those of the men.

It is alleged in plaintiff's brief that the positions of male and female police sergeant are substantially identical. Defendant, however, documents what common sense would indicate—there are significant distinctions. Many of the tasks performed by the police force are of such a nature, physiologically speaking, that they cannot and should not be assigned to women. Using firearms, patrolling the highways, maintaining roadblocks, conducting raids, ferreting out dangerous criminals, quelling gang warfare and riots are just a few examples.

In addition, the job specifications of the police department list, inter alia, the following distinctions. Policewomen sergeants are required to have a knowledge of the functions of community and social welfare agencies, and of the social problems in urban centers, particularly those which involve the delinquency of women and children. Also, they must have the ability to gain the confidence of adults and children having social and behavioral problems. Policemen sergeants are required to have a particular knowledge of the law of arrest and evidence, and of the principles and techniques of crime and accident investigation, interrogation and first aid.

It is obvious that the differences in qualifications for the two jobs are such that one test could not suffice—there would have to be a different test for men and for women. And if the Civil Service Commission can properly vary the substance of the two tests, by what rule should it be prohibited from varying the form? Our research has unearthed nothing requiring such proscription.

But, even if we assume that the jobs are identical, there can still be no valid constitutional objection to separate testing procedures. As mentioned above, the men and women in no way compete with each other. It must be kept in mind that the number who will be promoted to sergeant depends on the needs of the police force. The purpose of the Civil Service testing procedure is to see that the available promotions go to those who are best qualified. If ten policewomen sergeants are needed, the best ten performers from among the *women* who took the test will be promoted. The *most* the constitution could require is that all those competing for these ten positions be treated equally.

As a matter of fact, courts have even upheld unequal treatment in a comparable situation. *Goesart v. Cleary*, 335 U. S. 464, is one such instance. That case involved a Michigan statute which prohibited women from becoming licensed bartenders, unless their father or husband owned the bar. It should be noted that the statute resulted in unequal treatment *among women*, in addition to unequal treatment between women and men. In the instant case, all women involved are treated equally, and plaintiff's only objection is that women are not treated the same as men.

Mr. Justice Frankfurter for the majority, indicates the legality of a discrimination based on sex:

> "Michigan could, beyond question, forbid all women from working behind a bar."

He then goes on to point out the limited extent to which the Constitution will interfere with discriminatory action on the part of a state:

> "While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as be-

tween persons or groups of persons in the incidence of law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas,* 310 U. S. 141, 147."

There is no rule of law which requires that men and women receive equal treatment. Plaintiff has the burden of showing that the treatment she received was arbitrary, unfair, or prejudicial. This she has not done.

DISCRETIONARY POWER

Section 7-401(c) of the *Philadelphia Home Rule Charter,* Section on civil service regulations provides for:

"(c) Open competitive examinations to test the relative fitness of applicants for the respective positions."

The annotation to this Section states that:

"The Director should be free to use any investigation of education and experience, and any test of capacity, knowledge, manual skill, character or physical fitness which *in his judgment* serves this end." (emphasis supplied)

Where municipal authorities have acted within the ambit of their lawful authority, no principle is better settled than that the courts will not sit in review of administrative discretion in the absence of bad faith, fraud, arbitrary action or abuse of power. In *Blumenschein, Appellant v. Pittsburgh Housing Authority,* 379 Pa. 566 (1954), the court declared (P. 573):

"That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *Judicial* discretion may not be substituted for *Administrative* discretion." (emphasis by the court)

In the proper exercise of his administrative discretion, the personnel director took into consideration the practical aspects of conducting the examinations. At the most recent test date, there were 2,379 male and 25 female applicants. It would have taken 5 to 7 weeks to give each man an oral examination, yet all the women were examined in one day. It should be noted again the plaintiff's objection is not that the test is unfair, but that men seeking a comparable position take a different test.

The procedure adopted by the Commission is constitutionally valid, and within the sound discretion of that administrative agency. Plaintiff has not stated a cause of action upon which relief can be granted, nor has she shown cause why a preliminary injunction should issue.

Preliminary objections of defendant are sustained, and the complaint is dismissed.

By THE COURT:

LEVIN, *P. J.*

July 28, 1966

PERTINENT PART OF PETITIONER'S BRIEF BEFORE THE PENNSYLVANIA SUPREME COURT.

Statement of Questions Involved.

1. WAS THE ACTION OF THE PERSONNEL DIRECTOR IN REQUIRING AN ORAL EXAMINATION FOR APPLICANTS FOR THE POSITION OF POLICEWOMEN SERGEANT ARBITRARY AND UNREASONABLE AND THEREFORE AN ABUSE OF HIS ADMINISTRATIVE DISCRETION?

(The Court below answered this question in the negative.)

2. WAS THE ACTION OF THE PERSONNEL DIRECTOR IN REQUIRING DIFFERENT TESTING PROCEDURES FOR MALE AND FEMALE POLICE SERGEANTS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION?

(The Court below answered this question in the negative.)

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 358 JANUARY TERM, 1966.

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS No. 10 FOR THE COUNTY OF PHILADELPHIA (DOCKETED COURT OF COMMON PLEAS No. 4 MARCH

TERM, 1966. No. 2406).

RUTH S. WELLS,

Appellant,

v.

CIVIL SERVICE COMMISSION

AND

FOSTER ROSER, PERSONNEL DIRECTOR,
CITY OF PHILADELPHIA.

OPINION OF THE COURT.

(Filed January 6, 1967.)

PER CURIAM:

The Philadelphia Home Rule Charter empowers the Personnel Director "to use any investigation of education and experience, and any test of capacity, knowledge, manual skill, character or physical fitness which in his judgment serves this end." * In the exercise of this authority the

* Section 7-401(c)—Annotation.

Personnel Director of the City of Philadelphia prepared an examination for policewomen which differed somewhat from the one which applied to policemen. Specific in the distinction was the factor that policewomen seeking promotion to policewomen sergeancies were required to undergo an oral test, whereas the examination for policemen did not include an oral test.

Ruth S. Wells, a policewoman employed by the City of Philadelphia, seeking promotion to the position of policewoman sergeant, filed a Complaint in Equity against the Civil Service Commission and the Personnel Director of the City, praying for a decree which would eliminate the oral test from the examination for the position of policewomen sergeant.

The defendants filed Preliminary Objections averring that the Complaint failed to state a cause of action in that no justiciable issue was raised. The Court of Common Pleas of Philadelphia County sustained the Preliminary Objections, and dismissed the complaint. The plaintiff appealed.

The plaintiff contends that the oral test for female applicants and not for male applicants is an arbitrary and unfair discrimination and thus violates the equal protection clause of the 14th Amendment to the Constitution of the United States. The plaintiff admits in her brief that "there is, of course, no rule requiring equal treatment for men and women under all circumstances." That is the answer to the problem raised in this case. As stated by Justice *Frankfurter in Goesart v. Cleary,* 335 U. S. 464, "the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'"

While it would be banal superfluity to state that women are entitled to the same rights and prerogatives of citizenship as men, it cannot be said, in the interests of public welfare, that they may compel an employer to assign them to tasks for which, in the best, impartial judgment of

the employer, they may not only not be properly trained, but tasks where they may be subjected to perils with which they are not fitted to cope. For instance, there are some phases of firefighting where a man, because of superior physical strength, hardened muscles and intensive training can unquestionably combat a conflagration more effectively than a woman. On the other hand, there are fields in which women can do a better job than men, as, for instance, the superintendency of a girls' school.

The plaintiff argued in the court below that the position of male police sergeant and female police sergeant are substantially identical. The Court replied to this argument:

> "Many of the tasks performed by the police force are of such a nature, physiologically speaking, that they cannot and should not be assigned to women. Using firearms, patrolling the highways, maintaining roadblocks, conducting raids, ferreting out dangerous criminals, quelling gang warfare and riots are just a few examples.
>
> In addition, the job specifications of the police department list, inter alia, the following distinctions. Policewomen sergeants are required to have a knowledge of the functions of community and social welfare agencies, and of the social problems in urban centers, particularly those which involve the delinquency of women and children. Also, they must have the ability to gain the confidence of adults and children having social and behavorial problems. Policemen sergeants are required to have a particular knowledge of the law of arrest and evidence, and of the principles and techniques of crime and accident investigation, interrogation and first aid.
>
> It is obvious that the differences in qualifications for the two jobs are such that one test could not suffice —there would have to be a different test for men and

for women. And if the Civil Service Commission can properly vary the substance of the two tests, by what rule should it be prohibited from varying the form? Our research has unearthed nothing requiring such proscription."

In seeking promotion to the position of police sergeant, the men and women do not compete against each other. When a policeman sergeancy is vacant, the job will be filled from policemen; when a policewoman sergeancy is available, only policewomen qualify. Although policemen and policewomen wear the same kind of a badge, exercise the same governmental authority, their responsibilities and particular missions may be so dissimilar that to subject them both to precisely the same test might in itself be a demonstration of unfair treatment.

A practical reason also enters into the matter of selection for promotions. The vastly superior number of male police officers as against the number of female police officers in Philadelphia make oral examination of the men, in a given situation, impracticable. In this respect, the lower Court said:

"At the most recent test date, there were 2,379 male and 25 female applicants. It would have taken 5 to 7 weeks to give each man an oral examination, yet all the women were examined in one day."

The Court below properly disposed of the issues before it, including the argument that the Personal Director abused his discretion.

Decree affirmed, costs to be divided between the parties.

Mr. Justice Roberts filed a dissenting opinion.

DISSENTING OPINION.

(Filed January 6, 1967.)

ROBERTS, *J.*

I agree with the majority that the employment of different tests for applicants seeking the position of police sergeant and policewoman sergeant of itself does not violate the equal protection clause of the fourteenth amendment of the Constitution of the United States. However, in my view the determinative issue, one which the majority does not discuss, is whether the use of oral examinations, which constitute 40% of the women applicants' grade, so violates the merit principles of the civil service system that its utilization is an abuse of discretion on the part of the Personnel Director.

Section 7-300 of the Philadelphia Home Rule Charter provides:

> "The purpose of the civil service provisions of this charter is to establish for the City a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, demotion, transfer, lay-off, removal and discipline of its employees, and other incidents of City employment."

Under current regulations the examination for policewomen sergeant consists of three parts weighted as follows: 50% is written, 10% is based upon seniority considerations, and 40% upon the oral examination.[1] By no stretch of the imagination can this examination be characterized as scientific. I trust that the vast majority of the examiners, if not all, are conscientious individuals who will attempt to administer the oral portion of the test in an objective manner. But it must be remembered that the examiners are also human and an oral examination

1. In contrast, the examination for male police sergeant consists of a written examination (90%) and a 10% seniority rating.

necessarily involves highly personal and subjective standards of scoring even under optimal conditions.

Even if one were to concede the majority's conclusion that the position of police sergeant and policewoman sergeant are not substantially identical, there is no suggestion that the qualifications necessary to be a policewoman sergeant cannot be adequately tested by written examination. If appellees had demonstrated that oral examinations were essential to the proper selection of policewoman sergeants, conceivably we would have a different case.[2] But the force of appellees' argument is simply that it is impractical to give men oral examinations. Since the oral examinations challenged by appellant could easily subvert the principle of merit promotion, I believe that, in the absence of a demonstration of necessity, the 40% emphasis placed by the Personnel Director upon the oral examination of candidates for the position of policewoman sergeant is an abuse of discretion.

I dissent.

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2. At oral argument the City admitted that it knew of no other civil service examination which placed so great a stress on oral examination.